on a life insurance policy by the beneficiary therein which is testamentary in its character, but which has not been, and cannot be admitted to probate is not admissible in evidence to show title in the legatee named in said endorsement, and a payment of the policy by the insurer to such beneficiary is wrongful. Nor, in an action on the policy, is evidence relevant that merely tends to show that the endorsement was made in the presence of witnesses, at the special instance and request of the beneficiary, and that she made her mark as a signature thereto. A will must be proved before a probate court in a proceeding for that purpose.

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SPILLER AND OTHERS v. WELLS AND OTHERS. Decided at Richmond, January 12, 1899.—*Keith*, P:

1. CONFLICT OF JURISDICTION—*How determined—How jurisdiction acquired.* Between courts of concurrent jurisdiction, except as to technical creditors' bills, that court which first acquires cognizance of the controversy, or obtains possession of the property in dispute, is entitled to retain it until the end of the litigation, and should decide all questions which legitimately flow out of the controversy. Jurisdiction is acquired by the issue and service of process, and in case of conflict between courts of concurrent jurisdiction, the date of service of the process determines the priority of the jurisdiction. The first suit, however, must afford the plaintiff in the second an adequate and complete opportunity for the adjudication of his rights.

2. MECHANIC'S LIEN—*Suit by sub-contractor—Act of limitation as to general contractor and other sub-contractors.* A suit by a sub-contractor to enforce a mechanic's lien which has been duly recorded, to which the general contractor is made a party defendant, and his recorded lien properly set forth in the bill, stops the act of limitation from running not only on the complainant's lien, but also on the lien of the general contractor and all claiming as contractors under him, and operates to suspend any further suit by any one or more of them during the pendency of the suit instituted by the sub-contractor.

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BURRUSS v. NATIONAL LIFE ASSOCIATION OF HARTFORD, CONN.—Decided at Richmond, January 12, 1899.—*Harrison*, J:

1. INSURANCE—*Application a part of policy—Section 3252 of Code applies to application.* Section 3252 of the Code, which provides that no failure to perform any condition or restrictive provision of an insurance policy shall be a valid defence to an action thereon unless such condition or restrictive provision be printed in type of a specified size, or written with pen and ink in or on the policy, applies alike to the application, and the policy issued thereon, where the application is expressly made a part of the contract of insurance.

2. INSURANCE—*False statements of applicant—Knowledge of agent.* No recovery can he had on a life insurance policy procured upon wilfully false statements of the assured of facts material to the risk, although the insurance was solicited by the agent of the insurance company, and the beneficiary informed the agent that he did not believe insured could obtain insurance, that he had heard that insured was in bad health, and had been rejected by other companies.

SURANCE—*Misrepresentations of assured—Ignorance of beneficiary.* If insur-

ance be effected upon the life of a debtor for the benefit of his creditor, and misrepresentations of material facts inducing the contract be made by the debtor, the policy will be vitiated although the beneficiary was ignorant of such misrepresentations.

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TYSON v. WILLIAMSON. Decided at Richmond, January 12, 1899.—*Buchanan*, J:

1. EQUITABLE DEFENCES AT LAW—*Fraud in procurement of contract—Sec. 3299 of Code—Rescission.* Fraud in the procurement of a bond was not available as a defence at common law in an action on the bond, but is so available under sec. 3299 of the Code, and under it the defendant can claim compensation or damages for the injury which he has suffered by reason thereof, but the plea must allege the amount to which the defendant is entitled by reason of the matters contained therein. The plea, however, under the statute, is not available as a defence to a bond given for the purchase price of real estate, if the defence is such as to require a rescission of the contract, and a reinvestment of the vendor with the title to the property.

2. DAMAGES—*Fraud in procurement of contract.* Damages for fraud in the procurement of a contract for the sale of land must be ascertained and fixed as of the date of the contract, and not as of the date of a plea to an action on the contract. A plea which avers that the land was worthless at the time the plea was filed is bad.

3. INSTRUCTIONS—*Evidence to support.* If there is any evidence tending to prove the facts upon which an instruction is based, and it correctly states the law applicable thereto, it should be given.

4. PLEADING—*Action by payee and nominal owner of bond—Defences against real owner.* The real owner of a lot, without disclosing his ownership, represented to the defendant that the plaintiff was the owner, and sold it to the defendant as the plaintiff's property, and took the bond of the defendant therefor payable to the plaintiff.

*Held:* In an action on the bond by the obligee against the obligor, the defendant may make the same defences as he could have made if bond had been payable to the real owner, and had then been assigned by him to the plaintiff.

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HOGE & HUTCHINSON v. TURNER.—Decided at Richmond, January 12, 1899.—*Riely*, J:

1. EVIDENCE—*Competency of husband and wife—At common law—In Virginia—Conveyances from husband to wife.* At common law husband and wife were incompetent to testify for or against each other in any matter in which either had an interest directly involved in the suit, whether parties thereto or not; and, although disqualifications on account of interest have been removed in this State, the common law disqualification of husband and wife to testify for or against each other has been retained in proceedings by creditors to avoid or impeach conveyances, gifts or sales from one to the other on the ground of fraud, or want of consideration.

2. HUSBAND AND WIFE—*Fraudulent conveyances—Remedy of creditor—Competency of husband and wife to testify.* Creditors seeking to avoid a conveyance of